CHONG LAY KWONG

v.

LIM LAY KUAN

HIGH COURT MALAYA, KOTA BHARU
MUHAMMAD KAMIL AWANG J
[DIVORCE PETITION NO: MT(1) 33-22-1999]
21 FEBRUARY 2001

FAMILY LAW: *Divorce - Irretrievable breakdown - Whether proved - Living apart continuously for two years - Whether respondent forced to leave petitioner - Whether petitioner may rely on constructive desertion as proof of irretrievable breakdown - Law Reform (Marriage and Divorce) Act 1976, ss. 53, 54(1) & (2)*

In this petition for divorce, the petitioner relied on the ground that the parties had lived apart for a continuous period of two years pursuant to s. 54(1)(d) of the Law Reform (Marriage and Divorce) Act 1976. In fact, the petitioner had committed adultery and had been violent to the respondent which drove the respondent to leave the matrimonial home with their child.

Held:

[1] In considering whether it would be just and reasonable to make a decree on the ground that the marriage has irretrievably broken down, the court should consider all the circumstances including the conduct of the parties and how the interests of any children of the marriage or of either party may be affected if the marriage is dissolved. If it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it should dismiss the petition (s. 54(2) Law Reform (Marriage and Divorce) Act 1976 .

[2] Desertion is not the withdrawal from a place but from a state of things. The factum of desertion can be established even if the parties are living under one roof. Desertion *per se* without more is not a good ground to assert that a marriage has irretrievably broken down.

[3] The relationship does not end so long as both parties *bona fide* recognise it as subsisting. What is required to be proved to the satisfaction of the court is both a physical separation and a mental attitude on the part of one or both of the spouses.

[4] The fact of separation is a *prima facie* evidence of a breakdown but the petitioner has to prove that the breakdown is irretrievable. Constructive desertion does not constitute an irretrievable breakdown of a marriage. In the instant case, the respondent was justified in leaving the matrimonial home after the violent attack by the petitioner who caused her physical injury.

[5] The respondent felt that the marriage could be saved for the sake of their son. She was determined and positive that her marriage could one day be normalised. As such, she opposed the petition.

[6] The petitioner failed to prove that the marriage had irretrievably broken down and the respondent had *bona fide* recognised the marriage as subsisting. In the circumstances, it was wise not to dissolve the marriage.

Per curiam

[1] While all couples eventually lose a bit of the honeymoon euphoria, those that remain married do not consider it a crushing blow but rather a natural transaction from a "romantic relationship" to a "working relationship". Unlike the fantasy quality, the respondent felt a deep sense of companionship with the husband and had never harboured any outrageous expectation. The marriage was filled with more conflict and ambivalence, but it had lost only a modicum of good feeling. That was the feeling that the respondent had towards the marriage.

[2] Many people in such relationships are content, finding their marriage a reassuring stable foundation that allows them to devote to career, children and other pursuits. Others are dissatisfied, think rewards outweigh drawbacks. Some people may eventually leave in search of fine romance.

[Petition dismissed.]

Case(s) referred to:
Bhanu Sekaramani v. Nagamma [1991] 2 CLJ 1356 ***(foll)***
Brickel v. Brickel [1974] Fam 31 ***(refd)***
Parker v. Parker [1972] Fam 116 ***(refd)***
Perry v. Perry [1952] P203 ***(refd)***
Pheasant v. Pheasant [1972] Fam 203 ***(not foll)***
Pulford v. Pulford [1923] P18 ***(refd)***
Springfellow v. Springfellow [1976] 2 All ER 219 ***(foll)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 54(1)(d), (2)
Matrimonial Causes Act 1973, s. 1(2)(e)

For the petitioner - Lim Tow Fuh (Mr Daljeet with him); M/s Daljeet S Shacdev & Co
For the respondent - Teo Poh Onn; M/s HS Lim & Malik

Reported by Usha Thiagarajah

JUDGMENT

Muhammad Kamil Awang J:

The petitioner and the respondent were Sales Representatives for Medical Apparatus Company and they first met at the company's seminar at Kota Bharu in 1989. They appeared to have many things in common, though of different religious backgrounds, – the petitioner is a Christian and the respondent a Buddhist, they decided to get married on 18 January 1989 at Lim Lay Kuan Registry, Pasir Mas ("CLK1"). After the marriage they lived at 2697F Jalan Telipot, Kota Bharu. Sooner than expected, the couple was blessed with the birth of a son, Royston Cheng Swee Cheang on 19 August 1989. This certainly strengthened the marriage.

In 1991 the couple left Kota Bharu and settled in Kuala Lumpur at 1908 Unit 100, Menara Seputeh, Jalan Klang Lama. It seemed to be quite a happy marriage but not for long it changed into a rocky union; domestic quarrels increased in frequency, which culminated one day when the petitioner could not restrain himself, and in a violent rage – punched and broke the respondent's nose. The neighbours took her to hospital where she was hospitalised. Following a report, the police arrested the petitioner and he was kept in the lock-up for four nights. At the behest of the respondent, the petitioner was released from custody with no charge pressed against him. On returning home, the petitioner found the house empty as both the respondent and the son had gone.

Apparently the respondent took the son and left Kuala Lumpur when the petitioner was detained by the police. They went back to Kota Bharu to be with the respondent's parents. The petitioner did not come to fetch them back to Kuala Lumpur, and since then the petitioner and the respondent had lived separately. Occasionally, the petitioner visited the respondent and son in Kota Bharu. In 1997 while on a visit to Kota Bharu, the petitioner took the son with him to Kuala Lumpur without the consent of the mother, the respondent. However the respondent did not try to take the son back into her custody.

In 1999 the petitioner broke up with his woman friend, who left him. The petitioner had an unstable life while the son was looked after by his parents. An attempt at reconciliation by a Marriage Tribunal was without success.

During the trial, the respondent testified that she was prepared to forgive and forget, and was willing to go back to the petitioner. But the petitioner refused to accept her back because he no longer loved her. Since the separation, the respondent did not receive any maintainance from the petitioner.

The respondent produced a psychiatric report dated 7 February 2001 from the Hospital University Sains Malaysia at Kota Bharu, which stated that the respondent was normal and stable. She was suffering from depression with marital problems. She suffered no mental or perceptual disturbance.

In this petition for divorce the petitioner relied solely on the ground that the parties had lived apart for a continuous period of two years as envisaged in sub-s. 54(i)(d) of the Law Reform (Marriage and Divorce) Act 1976.

The Law Reform Act says that in considering whether it would be just and reasonable to make a decree on the ground that the marriage has irretrievably broken down, the court should consider all the circumstances, including the conduct of the parties and how the interests of any children of the marriage or of either party may be affected if the marriage is dissolved, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it should dismiss the petition (see s. 54(2) *ibid*).

"Conduct of the parties" includes, but is not confined to, the commission of the matrimonial offences by the parties. See *Brickel v. Brickel* [1974] Fam. 31. Adequate notice must be given to such allegations by either parties.

In *Parker v. Parker* [1972] Fam. 116, Cumming-Bruce J at p. 119 said:

> It appears to me that if either party intends to rely upon any matter of misconduct of the other party, or any other particular circumstances which is alleged to be relevant to the court's consideration, the other party should give notice thereof in sufficient time to enable the allegation to be investigated and rebutted.

On the evidence as a whole it appears that the petitioner had committed a few offences under s. 54 of the Act. The misbehaviour and adultery had been admitted by the petitioner and the respondent, desirous of saving the marriage, had overlooked and condoned these offences. The other ground of desertion by the respondent had no evidence in support. Desertion is based on the rejection by one party of all obligations of marriage, *Perry v. Perry* [1952] P 203. "Desertion is not the withdrawal from a place but from a state of things" per Lord Merrivale in *Pulford v. Pulford* [1923] P 18 at p. 21. The factum of desertion can be established even if the parties are living under one roof. As said by Lord Denning LJ (as he then was):

> The husband who shuts himself up in one or two rooms of his house, and ceases to have anything to do with his wife, is living separately and apart from her as effectively as if they were separated by the outer door of a flat. They may meet on stairs or in the passageway, but so they might if they each had separate flats in one building. If that separation is brought about by his fault, why is that no desertion? He has forsaken and abandoned his wife as effectively as if he has gone into lodgings. The converse is equally true. If the wife ceases to have anything to do with, or for, the husband and he is left to look after himself in his own rooms, why is that not desertion? She has forsaken and abandoned him as effectively as if she had gone to live with her relatives. *Hopes v. Hopes* [1949] P 227 at p. 235.

The parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition (s. 54(1)(d) *ibid*).

This is similar to s. 1(2)(e) of the Matrimonial Causes Act 1973 – living apart fact.

As was said by Ormrod, J. In *Pheasant v. Pheasant* [1972] Fam. 203 at 207:

> Separation is undoubtedly, the best evidence of breakdown, and the passing of time, the most reliable indication that it is irretrievable.

In *Springfellow v. Springfellow* [1976] 2 All ER 219 it was held that desertion *per se* without more is not a good ground to assert that a marriage has irretrievably broken down.

The relationship does not end so long as both of them *bona fide* recognised it as subsisting. What is required to be proved to the satisfaction of the court is both a physical separation and a mental attitude on the part of one or both of the spouses.

In a Malaysian case of *Bhanu Sekaramani v. Nagamma* [1991] 2 CLJ 1356 the court held that the fact of separation is a *prima facie* evidence of a breakdown, but the petitioner has to prove that the breakdown is irretrievable. In other words, a constructive desertion does not constitute an irretrievable breakdown of a marriage.

In the instant case, violent behaviour had driven the respondent to leave the matrimonial home and she was justified in leaving the matrimonial home after the violent attack that caused physical injury to herself.

In his testimony in court the petitioner seemed to be living under a fantasy and concorted a make-believe story. The evidence suggested that it was a love-marriage, but the petitioner vehemently denied it saying that he never loved the respondent from the very beginning. During the 1989 Seminar held by the

company at Kota Bharu, a prank among the male participants which posed a challenge, – who could bed the respondent, not for reward but male chauvinism. Be that as it may, the petitioner was lucky and went on to marry the respondent. A child was born in wed-lock, would have turned a loveless marriage into a strong one.

There was no evidence that the petitioner was violent by nature, but the conflict was clearly caused by an outside element, the presence of another woman. He testified that the respondent did not allow him to leave and had locked him in the house. She refused to hand him the key and he lost his temper and assaulted her.

While all couples eventually lost a bit of the honeymoon euphoria, those that remained married don't consider a crushing blow, but rather a natural transaction from "romantic relationship" to "working relationship". Unlike the fantasy quality, the respondent feels a deep sense of companionship with the husband, and have never harboured any outrageous expectation. The marriage is filled with more conflict and ambivalence, but it has lost only a modicum of good feeling. This was the feeling that the respondent had towards the marriage.

Many people in such relationships are content, finding their marriage a reassuring stable foundation that allows them to devote to career, children and other pursuits. Others are dissatisfied, thinking rewards outweigh the drawbacks. Some people may eventually leave in search of "fine romance".

In the circumstances, the respondent felt that the marriage could be saved at the very least for the sake of the son, Royston. She was prepared and prayed that one day the petitioner would be more realistic and come to his senses.

The loss of love and affection than escalating conflict, was the salient predator of distress. Given time she believed that the distress could be overcome, just like every cloud has a silver lining. As marriage is a holy union, she was determined and positive that her marriage could one day be normalised. As such she opposed the petitioner's petition.

The petitioner has failed to prove that the marriage had irretrievably broken down and the respondent had *bona fide* recognised the marriage as subsisting. I would, in the circumstances, think that it is not wise to dissolve the marriage, and I would dismiss the petition with costs.